IN THE

Supreme Court of the United States

October Term, 1964

No. 62

FEDERAL TRADE COMMISSION,

Petitioner,

v.

COLGATE-PALMOLIVE COMPANY and
TED BATES & COMPANY, INC.,

Respondents.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICUS CURIAE*

GILBERT H. WEIL,
Attorney for Association of National Advertisers, Inc., as Amicus Curiae.

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Interest of *Amicus Curiae* [1]

"Everyone knows that on TV all that glisters is not gold. On a black and white screen, white looks gray and blue looks white: the lily must be painted. Coffee looks like mud. Real ice cream melts much more quickly than that firm but fake sundae. The plain fact is, except by props and mock-ups some objects cannot be shown on television as the viewer, in his mind's eye, knows the essence of the objects.

"The technical limitations of television, driv[e] product manufacturers to the substitution of mock-up for the genuine article, if they wish to use what they may regard as perhaps their most effective advertising medium, * * *" [2]

[1] The parties to this appeal have consented to filing of the within brief.

[2] *Carter Products, Inc.* v. *F.T.C.*, 323 F. 2d 523, 525 (5 Cir. 1963). Similarly, the court below, in the within case, stated, as footnote 2 in its opinion of December 17, 1963 (326 F. 2d 517, 519):

[continued on page 2]

The Association of National Advertisers, Inc. (ANA) is a non-profit trade association of the very "product manufacturers" who wish to use this "most effective advertising medium". Its membership embraces approximately 700 companies, representing a wide cross-section of industry.[3] While ANA members make use of every advertising medium, its interest in this particular appeal is strengthened by the fact that its members represent the bulk of the national support for television, as 85 of the 100 leading users of that medium are ANA members.[4]

[continued from page 1]

"It is recognized for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be 'made up' or entirely replaced by 'mock-ups' although the result is a faithful and accurate portrayal."

[3] The industry classifications of its members include Agricultural Equipment; Automotive; Automotive Accessories; Brewing; Building Materials; Chemicals; Clothing and Textiles; Drug and Toiletries; Electrical Equipment; Food and Grocery; Industry Trade Associations; Insurance; Jewelry; Optical; Photographic; Sports Goods; Liquor and Wine; Metals, Basic; Non-Electrical Household Furnishings; Office Equipment; Paper; Petroleum; Soaps, Cleansers, Polishes; Soft Drinks; Tire and Rubber; Tobacco; Travel and Transportation; Industrial (other than metals or chemicals).

[4] Advertising Age, April 17, 1964, at page 11, lists the following as the 100 leading users of television advertising for 1963. We have added asterisks to indicate those who are members of ANA.

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The objects of ANA, as concisely stated in Article III of its Constitution, are "• • • the safeguarding of the essential values in advertising as an instrument for inducing sales; the elimination of waste and inefficiency in

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*Proctor & Gamble
*Colgate-Palmolive
*American Home Products
*Bristol-Myers
*General Foods
*Lever Brothers
*R. J. Reynolds Tobacco
*Alberto-Culver
*General Mills
*General Motors
*Gillette
*Kellogg
Coca-Cola/Bottlers
*Philip Morris
*Miles Laboratories
*American Tobacco
*P. Lorillard
*Warner-Lambert
*Liggett & Myers
*William Wrigley Jr.
*Campbell Soup
*Brown & Williamson
*Sterling Drug
*National Biscuit
*Ford Motor
*Ralston Purina
*Corn Products Co.
*Block Drug
*National Dairy Products
*J. B. Williams
Pepsi-Cola/Bottlers
*Chesebrough-Pond's
*S. C. Johnson & Son
*Chrysler Corp.
*Joseph E. Schlitz Brewing
International Latex
*Pillsbury
*Menley & James Labs.
*Standard Brands
Anheuser-Busch
*Nestlé Co.
*Richardson-Merrill
General Motors/Dealers
*Purex Corp.
Food Manufacturers Inc.
Simoniz Co.
*Consolidated Cigar
*Borden
*Avon Products
*American Cyanamid
*Falstaff Brewing
*Quaker Oats
*Distillers Corp., Seagrams Ltd.
*Andrew Jergens Co.
*Eastman Kodak
*Pabst Brewing
*Carnation
Sears, Roebuck
*Drackett Co.
*Kimberly-Clark
*Mattel
*Frito-Lay
*Noxzema Chemical
*Revlon
*Socony Mobil Oil
*Shulton
*American Motors
*H. J. Heinz
*Lehn & Fink Products
Sunbeam
*Canadian Breweries
*Kaiser Industries
*Reynolds Metals
*Armstrong Cork
*U. S. Borax & Chemical
*Norwich Pharmacal
*R. T. French
*Prudential Insurance

[continued on page 4]

the process of distributing goods, wares and merchandise; the furtherance of the science of advertising and marketing; and the promotion of the common interest and welfare of its members, as buyers of advertising, and otherwise." Under its responsibilities, as thus chartered, ANA sets forth herein its legal arguments in opposition to a concept the Federal Trade Commission seeks to enforce which would seriously impair advertisers' ability to use television most effectively, and in a manner that is entirely fair and non-injurious to the public.[5]

The interest and argument of *amicus* on this appeal do *not* extend to any aspect of the case which might concern alleged misrepresentation—even by means of props or mock-ups—as to the qualities, characteristics, performance, or test responses of the advertised product.

The Commission's petition for certiorari described the "question presented" as "Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim (which may itself be true), when the test is a sham which proves nothing because of the undisclosed use of a 'mock-up' in the

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[continued from page 3]

*Shell Oil
*Carter Products
*Beech-Nut Life Savers
*Armour
*E. I. duPont de Nemours
*Johnson & Johnson
*General Electric
*Continental Baking
Ford Motor/Dealers
Helene Curtis Industries
*Scott Paper
Charles Pfizer & Co.
*General Cigar
Beecham Products
Chrysler/Dealers
Royal Crown/Bottlers
*Goodyear Tire & Rubber
*Radio Corp. of America
*Union Carbide
*Theo. Hamm Brewing
*Seven-Up Co.
Green Giant

[5] Comment, Illusion or Deception: The Use of "Props" and "Mock-ups" in Television Advertising. 72 Yale L. J. 145, 153-158 (1962).

test." In its brief, on the other hand, the Commission omits from its "Question Presented" (page 2) the parenthetical phrase "which may itself be true".

If this means that the Commission now accepts that merely using a substitute for an authentic component in the course of a televised or printed depiction of a test or demonstration is not unlawful where 1) the product claim is true, and 2) the test, experiment or other similar demonstration can in fact be performed as portrayed, and would look the same in real life when done with genuine components as it does over television or in print when depicted with the aid of props or mock-ups, *amicus curiae* loses further interest in this appeal.[6]

It seems, however, from the Commission's arguments, which will be discussed below, and from its use of the words "observed test" in its brief to define the question presented, rather than "test", as in its petition for certiorari, that it holds out for a *per se* illegality in the mere act of visually depicting a conscientious facsimile of a demonstration in place of the demonstration itself.

Summary of Argument

It is not an unfair or deceptive act or practice within the meaning of § 5(a)(1) of the Federal Trade Commission Act,[7] to use a prop or mock-up to produce a picture

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[6] In phase with the court below, "By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the 'test' which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up." 326 F. 2d at p. 521.

[7] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 15 U. S. C. § 45(a)(1).

which is materially the same as what one would see if he were observing the same display or demonstration without the intervention of the advertising medium [8] and without the use of such prop or mock-up. A proceeding by the Commission to prohibit such use of props or mock-ups is not in the interest of the public within the meaning of § 5(b) of the Federal Trade Commission Act.[9]

ARGUMENT

POINT I

Undisclosed use of technical aids, including props or mock-ups, to produce an advertisement is not actionably deceptive, when the picture they create is a faithful duplicate of the authentic product or demonstration they purport to represent.

The legal issue is a clearly drawn one.

The Commission urges that where a visual display or demonstration is offered to substantiate a claimed fact, it is illegally deceptive if the components of the picture are not the genuine items they seem to be; for, asserts the Commission, under those circumstances what is being shown is not in truth the proof it is held forth to constitute.

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[8] While this case involves television, the order would seem equally applicable to magazine, newspaper, billboard, direct mail, handbill or any other form of pictorial advertising.

[9] "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public,* it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * *" (Emphasis added.) 15 U. S. C. § 45(b).

Passing, *arguendo*, the highly debatable proposition that there is inevitably implicit in a visual demonstration a promise that no prop has been used, our answer is that, assuming the existence of undisclosed artifice, the conclusion does not follow that it is material deception, or a public injury, where what the viewer sees does not materially differ from what he would have seen had genuine articles or procedures been used rather than props or mock-ups.[10]

The caliber of the Commission's argument is indicated by this very fact, that if it prevails there will be not the slightest difference in what the viewer sees in an advertising illustration, or in the truthfulness of the message it imports. Assuming that the technical vagaries of the medium do not distort the authentic product or event into a false image, the picture one sees will be identical, whether the true or a simulated article or demonstration is used as the photographed model; and the essential meaning of its communication, as to the nature and qualities of the wares, will be unchanged.

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[10] The Commission's order being directed only against "undisclosed" use of props or mock-ups, the Court might justifiably wonder why the entire problem may not be simply solved by disclosure.

Intially, of course, this is a begging of the question. If, as will be shown, the undisclosed use of the prop is not a material deception, there is no illegality to be rectified. Passing that, *arguendo*, there is the problem of time limitations in broadcast commercials, recognized by the court below in its allusion to " * * * the inroads into the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aids, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive" (326 F. 2d at page 523). This would be compounded by the difficulty of clearly describing which portion of, and the extent to which the demonstration is artifice where only some of its elements are not genuine.

Stated most simply, then, the Commission concludes that a substantial body of the public, seeing a "demonstration"[11] depicted in an advertisement, will be moved to purchase the product if it believes that no prop or mock-up has been used, but will not wish to buy if it knows that such a device has been used, *even though it were also to know that the "demonstration" it sees is in all other respects wholly faithful to and an indistinguishable replica of the same demonstration when performed with the genuine product and test procedures.*

There is no evidence in this case to substantiate such a hypothetical determination and no basis for taking judicial notice that so strained a reaction is common to human experience. We witness an attempt by the Commission to establish a rule of law that such advertising is illegal *per se.*

The Commission's argument to justify this *ipse dixit* conclusion turns upon a false premise that there has been a so-called unchallenged "finding"[12] that the demonstration is made for the very purpose of inducing a purchase by convincing "otherwise skeptical viewers of the merits of Rapid Shave" (brief, p. 11);[13] and that what is thus offered is "rigged" and "could prove nothing as to the claimed effects" (*ibid.*); that such purchasers are "being tricked into making a purchase * * * [by] false inducement" (*id.*, p. 9) in the form of " * * * a rigged experimental 'proof' * * * sham tests * * * sham experiments" (*id.*, p. 16), "sham 'proof' " (*id.*, p. 19), and "a fake experiment" (*id.*, p. 21). Perhaps stung by the Court of Appeals' observation that

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[11] The meaning of "demonstration" in the Commissioner's order will be discussed below.

[12] *Amicus* understands that the respondents will argue there has been no such finding, and that if there had been it would not have been supported by any evidence.

[13] Accepting, *arguendo*, the stated purpose of the demonstration, *amicus* takes issue with the Commission's reasoning from there on.

such semantic indulgences are "long on generalities, short on analysis",[14] the Commission undertakes to rationalize the deception as residing in the viewers being misled into believing "that they have something more than the sponsor's say-so on which to base their purchasing decisions" (brief, p. 9), rather than "only the sponsor's word and not visual proof to justify [their] belief in the sponsor's claim" (*id.*, p. 19)—that they have "objective confirmation of the sponsor's claims" (*id.*, p. 21).

Here, then, may be the pivot of the case. We grant that if a test, experiment or demonstration such as the advertiser has described (whether by verbal or pictorial symbols should not differ in principle) could not be conducted, the Commission's characterizations of such misrepresentation would be valid. The argument falls apart, however, when in truth the demonstrations can be and have been performed, and the product reacts as depicted in the commercial. In those circumstances the purchaser does have something more than just the sponsor's word; he has the test as proof—objective confirmation of the very kind he is told he has. The test itself exists and is not "rigged"; neither is it "sham proof," nor a "fake experiment."

Thus, the Commission's case rests upon nothing more substantial than its assumption (unsupported by any evidence) that the decision to purchase will be critically altered by the difference between seeing a completely faithful portrayal of an existent demonstration, and seeing the demonstration itself.

The flimsiness of this contention is underscored by the Commission's discomfort over having it applied to "undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use" (brief, p. 18). In principle, there can be no distinction between a substitution to por-

[14] 326 F. 2d at p. 522.

tray a product or illustrate its uses, and one to portray a demonstration or illustrate its operation.

To draw an example from this very case, if we correctly understand the Commission's statements it would readily permit an advertiser of sandpaper to use a plexiglass and sand mock-up in order to portray the advertised sandpaper, but it would forbid a shaving cream manufacturer to do so in accurately depicting a test or demonstration of his product, even though both sponsors labor under precisely the same technical problems of accurately conveying a picture of sandpaper to the television viewing audience.

In both instances the viewers are being given what purports to be actual visual demonstration of the appearance and character of sandpaper instead of having "only the sponsor's word" for it; and if, as the Commission now concedes, one is lawful, the other must be so, too.

The real point is that as long as the sponsor's persuasion of purchasers that visual proof corroborates his product claim does not mislead them regarding the existence of such proof, there is no material deception whether it relates to the appearance or the functioning of a product in use or to its appearance or functioning under the conditions of a test or demonstration. Indeed, the difficulty of finding a real difference in the Commission's purported distinction has been well delineated by the court below.[15]

An advertiser's motivation to use artifice in the production of visual advertisements is not born of a desire to deceive. It is generated by technical considerations. The use of make-up, studio or stage lighting, dark room

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[15] 326 F. 2d at pp. 520-522.

techniques and the like have long been recognized and accepted as legitimate tools in the production of a finished picture, whether it be in print or on the stage, the moving picture screen, or, for that matter, in television itself. The physical natures of all these media are such that if the genuine article or demonstration were displayed or performed without technical compensations it would appear unreal to the viewer's eye.

Most television commercials are prepared on film or tape [16] and their production may involve several retakes—just as with a motion picture—before they are satisfactory. In many instances a product (such as a medicine, a hair dye, or even a food or beverage) cannot be re-used by the model throughout such repetitions (see footnote 2, page 2, above). A device must be employed so that whichever of the "takes" is ultimately used for telecast will appear to present a genuine use of the article by the actor, even though such may not be the fact.

As long as an artifice presents to the viewer the same visual image and impression he would receive were he to observe the genuine article or event at first hand and without the intervention of either television transmission or artifice, it is difficult to comprehend what harm has been done, what material deception has been practiced, or what illegality committed.[17]

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[16] "We may take judicial notice that commercials are normally prerecorded." Opinion below, 326 F. 2d at p. 522.

[17] It is interesting to note that Commissioner Elman, who wrote the opinions of the Commission below in this case, severely criticized the majority of the Commission in another matter (and was resoundingly vindicated on appeal) on the ground that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did." *Mary Carter Paint Co., et al.* v. *F. T. C.*, 333 F. 2d 654, 657 (5 Cir. 1964).

What the Commission is quarreling with is not the substantive content of the representation, but the mechanical means by which it is communicated.

The Commission offers a number of precedents, which are not really analogous, to support this avenue of attack (brief, pp. 14-15). The court below has summarized and analyzed this class of authorities at 326 F. 2d, pp. 520-523. The only additional observation that might be made here is that they are not in point, for involved in all of them is the misrepresentation of a separate and distinct ("extrinsic") fact, which in and of itself can materially affect the consumer's purchase decision. Thus, a person who might not buy upon a seller's claim as to the quality of its product could very well be persuaded by misplaced belief in the independent fact that "The X testing agency" (brief, p. 15) had checked and verified it. In the situation under discussion, however, the representation, made by visual devices, is that the product actually looks a certain way, or when subjected to a certain test really responds in a demonstrated manner. Such "extrinsic" representations are not false, but true.

To illustrate more comparably from the Commission's own examples, suppose that in the case of the advertised testing agency certification the endorsement had in fact been given, and that the commercial depicted a representative of the agency transmitting it to the advertiser. Mere undisclosed use of an actor in place of the actual attestor could hardly be deemed materially, and hence unlawfully, deceptive.[18]

Taken at its strongest, the Commission's case, in the ultimate analysis, rests upon nothing more than the difference between a representation that the viewer is observing

[18] Note the similar observation of the court below that mocking-up a testimonial document to overcome photographic difficulties in reproducing the original would not be unlawful. 326 F. 2d at p. 522, footnote 14.

a demonstration in actual progress, and the fact that he could and would see exactly the depicted demonstration going on except for technical limitations of the advertising medium.

The objective of the sponsor's commercial is to persuade the audience that such objective proof exists to corroborate a claim made for the product; and, in all truth, such proof does exist.

This, urges the Commission, is nonetheless unlawful.

There is also an apparent contention by the Commission that it requires a *per se* rule of illegality for props and mock-ups to facilitate its policing activities.[19] Suffice it to say that Section 5 of the Federal Trade Commission Act empowers it to enjoin only those activities that are unfair or deceptive. It does not, nor does any other charter, authorize the Commission to enjoin fair and non-deceptive acts or practices.

Finally, the Commission urges, at pages 22-24 of its brief, that its cease and desist order is valid because the respondents can consult in the future with the Commission to ascertain its application to a specific situation. This misses the point. The only question respondents could then debate would be whether the contemplated conduct falls within the language of the order. Issues of substantive validity of the cease and desist order itself would be foreclosed.

Subsequent consultations with the Commission, limited to construing what the order forbids,[19a] would not leave

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[19] Brief, p. 21; 326 F. 2d at p. 523, footnote 17.

[19a] Even where questions of construction are concerned the ability of a respondent to argue its substantive rights is severely curtailed. Cf. *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257 (3 Cir. 1961), *cert. den.* 368 U. S. 821 (1961), especially in light of Judge Hastie's dissenting opinion.

room for controverting the legal right of the Commission to impose a prohibition which the language of the order is held to embrace. The latter is not a matter of administrative discretion. It is a question of law, subject to final review by this Court; and is properly before it for determination at this time.

The language of *Vanity Fair Paper Mills, Inc.* v. *F. T. C.*, 311 F. 2d 480, 488 upon which the Commission relies was uttered in entirely different circumstances. Brought under § 2(d) of the Robinson-Patman Act, the question was whether general, rather than specific, proscriptive language could be used to enjoin promotional payments to one customer that would not be "available" to all other competing customers. There was no issue as to the Commission's substantive right to prohibit such discriminatory practices; the only problem was over the form of order to be used in doing so; *i.e.*, whether it could be worded in terms only slightly less general than "the Delphic terms"[19b] of the statute itself, or whether it should specifically describe what conduct was prohibited and what permitted. In the within case, however, it is the basic legality of conduct which the wording of the Commission's order embraces that is in dispute. Such a substantive determination is not to be left for later consultations.

POINT II

It is not in the public interest to obstruct effective use of television advertising by prohibiting harmless technical production procedures.

The Commission argues that its judgment as to what is harmful to the public should not be questioned by the courts.[20] This is not entirely correct.

[19b] 311 F. 2d at p. 485.

[20] Commission's Petition for Certiorari, pp. 13-17 (brief, p. 21).

Not only is the propriety of the Commission's conclusion that given facts constitute an unfair act or deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act a question of law properly subject to judicial review,[21] but the question of requisite public interest under Section 5(b) of the same Act is also one for ultimate determination in the courts,[22] notwithstanding the fact that they will ordinarily attach great weight to the Commission's views in deciding that issue.[23]

Resolution of the first of these two legal issues, *i.e.*, that of unlawful deception, will probably make it unnecessary for this Court to consider the second. In connection with the latter, however, it may be pointed out that in the situation at bar public interest is not a one-way street. While nothing overrides the importance of prohibiting material deception, attention may legitimately be given to the desirability of not unwisely or unnecessarily obstructing the most effective advertising use that can wholesomely be made of television. For one thing, the current economy of this nation depends critically upon successful mass selling of mass produced goods. The direct relationship of television advertising to that goal cannot be doubted. And the television industry itself, with the so-far minor exception of pay television, derives its financial support solely from advertising.

If advertisers are deterred, for tenuous and inconsequential reasons, from employing technical devices which the very nature of the medium requires if it is to be used advantageously for advertising purposes, and which have not been shown to affect the consumer in any substantial, material, or significant manner, their use of the medium

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[21] *Mary Carter Paint Co., supra*, p. 11.

[22] *FTC* v. *Klesner*, 280 U. S. 19 (1929).

[23] *Exposition Press, Inc.* v. *FTC*, 295 F. 2d 869 (2 Cir. 1961), *cert. den.* 370 U. S. 917 (1962).

will be seriously curtailed, and the tremendous public interest in this outstanding medium of news, entertainment and information may be put upon the altar of an administrative obsession.[24]

Respectfully submitted,

GILBERT H. WEIL,
Attorney for Association of National Advertisers, Inc., as Amicus Curiae.

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[24] "The Carter order bears an obvious resemblance to the Colgate-Palmolive order which was framed at a time when the Commission was unyielding in its hostility to mock-ups." *Carter Products Inc., et al.* v. *F. T. C.*, 323 F. 2d, at page 532 (5 Cir. 1963).

"* * * much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, * * *." Opinion below, 326 F. 2d, at page 519.